Kmart Corporation *and* Amalgamated Clothing and Textile Workers, AFL–CIO, CLC. Case 11–CA–16138

April 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On September 25, 1995, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] No exceptions were filed to the judge's findings that the Respondent did not unlawfully discharge Yvette Oldham or Monica Lewis in violation of Sec. 8(a)(1) and (3) of the Act.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Jane North, Esq., for the General Counsel.
Bruce A. Petesch, Esq. (Haynsworth, Baldwin, Johnson, and Greaves), of Raleigh, North Carolina, and *Sherry L. McMillan, Esq.*, of Troy, Michigan, for the Respondent.
Dean Vaughn, of Greensboro, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was tried at Greensboro, North Carolina, on February 15–17 and March 28–30, 1995. The proceeding was closed by order dated June 8, 1995. The original charge in Case 11–CA–16138 was filed by Amalgamated Clothing and Textile Workers, AFL–CIO, CLC (the Union), on July 27, 1994.[1] A complaint issued on September 9 against Kmart Corporation[2] (Respondent). The primary issues are whether Respondent's suspension and discharge of Marston Clark and the discharge of Brenda Stacks, Yvette Oldham, and Monica Lewis violate Section 8(a)(1) and (3) of the National Labor Relations Act (the NLRA or the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the detailed and helpful briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Michigan corporation with a warehouse facility located in Greensboro, North Carolina. From its Greensboro facility it is engaged in the distribution of products to retail stores in North Carolina, South Carolina, Virginia, West Virginia, and Tennessee. At all times material, Respondent purchased and received goods and materials valued in excess of $50,000 at its Greensboro facility directly from points outside the State of North Carolina. The complaint alleges, Respondent admits, and I find that Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent's large distribution center (DC) at Greensboro, North Carolina, covers an area approximately the size of 30 football fields. Around 500 employees work at the facility. In July 1993 the Union started an organizational campaign at the DC. This resulted in an election in September 1993 which the Union won. Collective-bargaining negotiations between the parties were continuing at the time of the hearing.

The complaint alleges no independent violations of Section 8(a)(1) of the Act. However, the Government did offer background evidence of some instances of unalleged conduct to support its theory of unlawful activity. The Respondent introduced testimony in rebuttal of the General Counsel's background evidence. I have taken this background information into account in reaching my decision.

B. *The Suspension and Discharge of Marston Clark*

The Government alleges that Marston Clark was suspended on February 10 and discharged on February 14 because of his union activities. The Respondent asserts that his dismissal was for the misappropriation of property, specifically, the unauthorized possession of company documents.

Clark was employed as a group leader/''supervisor.'' The parties agree that this is not a supervisory position within the meaning of 2(11) of the Act but rather a leadman position. Clark was an active and open union supporter. His picture appeared in several photos of a union handout. He wore a union T-shirt at work the day of the election. His picture appeared in a union handbill, and he handed out union literature. Clark was not the only group leader who supported the Union. Steve Herring, Debra Holt, Robert Darnell, and Carol Payne likewise were supervisor/group leaders whom the Company knew to have strong union sympathies.

[1] All subsequent dates refer to 1994 unless otherwise stated.

[2] The name of the Respondent appears as amended at the hearing.

The Government offered background evidence that Respondent questioned Clark's union support. On the eve of the September election, Supervisor Warren Hogan talked to Clark. He told him he could not believe that Clark was going to vote for the Union after the support he had given Clark in getting his supervisor job. Hogan said he thought Clark was stabbing him in the back. Hogan also angrily removed a production report from a bulletin board that noted Clark's superior performance when he had previously worked as an order filler. Clark asked Hogan if his union sympathies would hurt his chances of promotion. Hogan replied that he did not know because such matters were out of his control. Clark was questioned by Supervisor Karen Canjar later the same evening. Canjar asked him why he was voting for the Union. Clark explained his views, and Canjar told him he should do what he thought was right for him.

In approximately November 1993, Clark had two conversations with Supervisor Bryan Barton. On both occasions, Clark was wearing his union T-shirt and button. In the first exchange Barton asked him what he thought the Union could do for him that the Company could not. The following morning Clark met Barton as he was getting off work. Barton asked him how much money the Union was paying him to wear the shirt and button. Barton also said he had a lot of respect for Clark and he had made only one mistake since working there—voting yes for the Union.

As a group leader Clark was responsible for certain paperwork. Clark testified that he would routinely make copies of some of these documents for required distribution to other DC personnel. He also made extra copies of these and other documents and retained them in private files. His private files were kept at his residence or in his DC locker.

Management received reports that Clark had been observed spending most of one of his working shifts making copies. On February 10 an investigation was begun. Clark admitted he made and kept copies of some company production reports and had taken them home. He was asked to return Respondent's documents that he possessed. The next night he did return some of the documents. Later that evening he was asked to give a statement about his taking company paperwork home. Clark was then suspended.

On February 14 Clark called the Company and was told to return to the DC and bring any other company paperwork he had. Clark complied and gave the Respondent additional documents that he had not previously turned over. After examining these documents, the Company's representatives told him he was fired. Clark was escorted to his locker so he could get his possessions and leave the premises. The escort discovered more company documents in his locker. After the discharge, the Respondent determined that some of the documents had not been recorded in its computer system, thus merchandise had been needlessly lost in the warehouse.

Some employee witnesses testified that they had on occasion seen other group leaders take company paperwork from the DC. No evidence was offered that the Company authorized or generally had knowledge of these instances.

C. *Analysis of Clark's Discharge*

The General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). ''A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Clark was not treated disparately. Some evidence was introduced of other instances where personnel took documents off the premises. However, none of these examples were of the magnitude associated with Clark's behavior. Additionally, it was not shown that the Respondent generally had knowledge of these events or condoned the activity.

Clark's conduct in copying and taking company documents home is puzzling. Clark defended his behavior on the basis that he wanted to keep a record of what occurred on his shift. However, Clark failed to satisfactorily justify his unauthorized custody of this large number of business papers.

The record as a whole establishes that the Respondent had a legitimate concern about Clark's unapproved possession of its corporate documentation. Several of the papers Clark returned were originals and some documents had little or nothing to do with his responsibilities. The absence of some of these documents from the Respondent's files had a needlessly disruptive effect on its business operations. Additionally, Clark was not candid in reciting or returning all of the documents he possessed.

In sum, Clark's behavior raised serious issues of misconduct. I find that the Respondent has met its *Wright Line* burden of overcoming the Government's prima facie case and showing that Clark would have been terminated regardless of his union activities. The General Counsel did not sufficiently rebut Respondent's evidence. Thus the Government has failed to prove by a preponderance of the evidence that the Company violated Section 8(a)(1) and (3) of the Act when it discharged Marston Clark.

D. *Discharge of Brenda Stacks*

Brenda Stacks was hired on October 16, 1993, after which she became subject to a 90-working-day probationary period. Stacks was discharged on February 8 because her work performance was allegedly unacceptable.

Stacks testified she concealed her prounion sympathies until she mistakenly believed her probationary period ended on January 16. Thereafter Stacks' began wearing union insignia. She also was a participant in a union rally at which she was interviewed by the local newspaper. Her picture and remarks appeared in an article published January 27. She was quoted as saying it was hard to make ends meet on her $7-an-hour pay. The Company concedes it was common knowledge that Stacks was a union supporter. However, it argues that this was not unique as a majority of the 500 employees at the DC had shown similar support for the Union.

Stacks conceded that she had received several warnings about her work during her probationary period. Her warnings included such things as being tardy, lack of production, failure to follow instructions, and excessive talking. Several of the warnings preceded her open union activity. Supervisor Canjar noted that Stacks left her work area without authorization and ''liked to stand and talk quite a bit.'' Canjar thought Stacks lacked initiative. The Respondent introduced evidence that it was not uncommon to discharge employees during their probationary evaluation periods.

E. *Analysis of Stacks' Discharge*

Respondent demonstrated that Stacks was not a satisfactory employee. While she engaged in union activity, the record does not show that such support was the reason for her discharge. I find that the Government did not prove by a preponderance of the evidence that the Respondent violated the Act when it discharged Stacks during her probationary period.

F. *The Discharge of Yvette Oldham*

Yvette Oldham worked as a clerical in the receiving office. She also had an avocation as an aspiring artist. Oldham was discharged on March 1 for the misappropriation of company property. Oldham's union activity consisted of wearing a union T-shirt and stickers.

In September 1993 the Respondent posted a notice on its main bulletin board that employees were not to use company machines for unauthorized purposes. Evidence shows that there were nonetheless some instances when other employees breached that policy. For example, one employee copied a 20-page college catalog for a fellow employee. Also some Girl Scout cookie order forms—of unknown quantity—were copied. A fax machine was used to order lunch from a nearby restaurant. It is questionable that the Company had knowledge of these misuses until they were mentioned at the time of Oldham's discharge. It is also not certain that these other instances occurred subsequent to the Company's notice posting.

Oldham testified that on February 28 she wanted to make copies of 10 pieces of artwork she had drawn. She made duplications on the receiving office copier, however, their quality was poor. She then went to the front office to make better quality reproductions. Oldham testified that some supervisors were aware of her copying the artwork because they mentioned it to her or saw her doing it.

The number of copies Oldham made is in dispute. Oldham estimated she made 100. The Company's investigation showed she had made 522 copies of her artwork. The Respondent's conclusions as to the number of copies is supported by Oldham's fellow employee April Polk. She testified about seeing Oldham's stack of copies which she estimated to be 1-1/2 to 2 reams of paper.

Oldham testified that after she made the copies she returned to her office area and that her supervisor, Darrel McNeill, asked for and received three or four copies of her artwork. McNeill denied he ever sought or received copies of the artwork. Shortly thereafter McNeill approached her and asked her if the paper she had with her was all the copies she made. When she acknowledged they were, McNeill gave her the impression she might be in trouble. She was then sent to the front office to talk with Loss Prevention Manager Jack Bennett.

Oldham further testified that Bennett looked at the artwork and told her he just wanted to see what she had done. Bennett said he was not sure if she was in trouble. Oldham was next interviewed by Personnel Manager Dan Ward. He told her that he could not let her keep the copies but that her job was stable. He permitted her to keep one copy of each picture. She was then sent to the personnel department where she received notices of correction for two 1993 and two 1994 tardies. The next day Oldham was discharged on orders from Ward. Pursuant to a settlement agreement entered during the course of collective-bargaining negotiations, Oldham was rehired without backpay. She subsequently voluntarily quit.

The Respondent says that Oldham admitted making a large number of copies because she wanted to use them in selling goods at a craft show. Ward characterized Oldham's actions as not just making a copy of a cookie recipe but rather spending 45 minutes to make a large quantity of copies that she was going to use for her personal gain. McNeill testified Oldham also told him she was going to use part of the copies to support a job resume she was submitting to the local newspaper.

G. *Analysis of Oldham's Discharge*

Oldham admitted the copying was for her commercial benefit. Oldham's demeanor and testimony left the impression she was trying to minimize her actions. While Oldham admitted making 100 copies of her artwork, I find that the Respondent's version is the more accurate and that Oldham made 522 copies.

The evidence does not establish that the Respondent seized on Oldham's misappropriation of company property as a convenient excuse to fire her because of her union activities. Oldham was not an extraordinary supporter of the union movement. The Company had made a point of emphasizing in the rule posted prior to her discharge that employees could not use company machines as she did. Oldham ignored the company policy and made a large quantity of copies intended for her personal profit. I conclude that the Respondent has met its *Wright Line* burden of showing that Oldham would have been discharged regardless of her union activity. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it discharged Yvette Oldham.

H. *The Discharge of Monica Lewis*

Monica Lewis was a union supporter. Her union activities consisted of occasionally wearing a union T-shirt, hat, and stickers as well as passing out union leaflets.

Lewis was discharged on March 17 for exceeding her ''bank'' of leave hours on February 28. Each employee is annually given a number of hours of leave. As leave time is used it is deducted from the bank. The balance of leave hours is noted weekly on the workers' pay stubs. Lewis was given 24 bank hours as of January 1. She testified that at the end of the quarter on April 1 she would have obtained an additional 8 hours of leave. Lewis had depleted her bank of hours due to tardiness and absences so that by February 28 she only had 3.3 hours of leave remaining.

Lewis testified that while at work on February 28 she was feeling ill. She states that at 3:30 a.m. she stopped work, went to her supervisor, and reported her illness. She then went to see Supervisor Canjar. They talked in Canjar's office. Lewis says she told Canjar she was sick and wanted to check on her leave balance. Lewis also allegedly asked Canjar if she could get a special ''code 15'' leave permission to excuse her absence. Canjar told her that such leave was only used for absences such as snow days.

According to Lewis, Canjar checked a computer that was on Canjar's desk and she looked over the supervisor's shoulder. Lewis states she did not read the computer screen in detail but did see her name on the monitor. Canjar told her she could go home because she would accumulate 8 more hours the first of the month. Canjar then signed a pass for Lewis which bears the time 3:30 a.m. Lewis testified she was not aware of what time the pass stated as she did not read the document she was given.

Lewis states she attempted to check out, but her badge would not work in the scanner which electronically records her leaving the DC. She then went back to Canjar who told her that she would check her out. She then went to the lunchroom and briefly talked to a friend, Rebekah Nichols. At that point Lewis went to the guard desk, asked what time it was as she wore no watch, and was told it was about 3:45 a.m. She then left the DC premises.

Nichols, who no longer works for Respondent, remembered her friend Lewis talking to her about going home one night. She did not know a date this happened. She recalled it was during her lunch period which she took between 3:30 and 4 a.m. Nichols testified that Lewis told her she had been worried about her leave hours, but Canjar assured her everything would be all right if she went home.

On the evening of March 16, Lewis was absent from work. On March 17 she reported to work and checked with Andrea Earls in the personnel department. Earls said she could excuse her absence of March 16, but told Lewis she was already scheduled to be fired for exceeding her bank of hours on February 28 by 12 minutes. Earls advised her that she could reapply for her position. Lewis subsequently did attempt to reapply but was ultimately unsuccessful because she was prevented from coming on the property.

Supervisor Canjar disputed Lewis' version about asking for leave on February 28. Canjar denied that there was a computer in her office. Canjar also denied that she ever had access to a computer that would tell her the number of leave hours for an employee. She testified that Lewis did not ask for a code 15 leave on February 28. She did not recall Lewis reporting having problems checking out that night. Canjar denied giving Lewis any assurances concerning her bank of hours because she had no knowledge of her balance. Her practice was always to tell employees who asked about their leave balances to stop by the personnel office at 7 a.m.

Other witnesses confirmed Canjar's denial that there was ever a computer in her office or that she would have direct access to bank of hours information. Such computers are in the locked personnel offices and require special access codes to use them. Canjar does not have access to the personnel office or the necessary computer codes.

I. *Analysis of Lewis' Discharge*

Because of her demeanor, I do not credit Lewis as to what happened on February 28. I find that Lewis had stopped work prior to 3:30 a.m. and was not given the leave pass until that time. Canjar credibly testified that she set her watch by the timeclock and used that time when filling out a pass. Lewis is not credited when she says she did not look at the time on the pass.

Lewis was clearly embellishing her testimony with her unsupported story of having her leave hours checked by Canjar on the computer. The record as a whole supports Respondent's claim that it was impossible for Lewis to see Canjar check her bank of hours on a computer. No computer was ever in that office. The machines that could have done such checking were not accessible by Canjar.[3]

I also find Lewis' version of her conversation with Canjar was contrived for another reason. Lewis was aware that she would not get an additional 8 hours' leave in her bank until the start of a new quarter on April 1. Yet she testified she relied on Canjar's alleged representation she would receive 8 hours of leave the next day, March 1. This I also find to be a fabrication by Lewis.

While there was evidence of some historic exceptions in the granting of code 15 leave, these were reasonably explained. More importantly, they are found to be irrelevant because I do not credit Lewis that she asked Canjar for a code 15 excused absence.

The fact that Lewis was a union supporter did not place her in a unique role. More than half the DC had voted in favor of the Union. It was common for employees to wear prounion clothing as she did. There is insufficient evidence that the Respondent's motive in discharging Lewis was because of her union support. The Government has not met its *Wright Line* burden of proof, and I find that the Respondent did not violate Section 8(a)(1) and (3) by discharging Lewis.

CONCLUSIONS OF LAW

1. The Respondent, Kmart Corporation, is now, and at all times material has been, an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act.

2. Amalgamated Clothing and Textile Workers, AFL–CIO, CLC is a labor organization within the meaning of 2(5) of the Act.

[3] I also do not credit the testimony of Nichols. Based on her demeanor, Nichols was not an impressive witness. She could not place the date that her conversation with Lewis took place. Additionally, she could only testify to the hearsay report that Lewis gave of the conversation with Canjar. This is a version of that conversation that I discredit. Finally, the time that their conversation took place is not pertinent. As noted, I find that Lewis stopped work prior to 3:30 a.m. Thus, when she chose to actually leave the premises on February 28 is not relevant.

3. The General Counsel has failed to prove that the Respondent unlawfully suspended or discharged Marston Clark or unlawfully discharged Brenda Stacks, Yvette Oldham, or Monica Lewis in violation of Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.